



INTERNATIONAL CONFERENCE ON THE
REVISION OF THE SUA TREATIES
Agenda item 6

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CONSIDERATION OF:

**A DRAFT PROTOCOL TO THE CONVENTION FOR
THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF
MARITIME NAVIGATION, 1988**

and

**A DRAFT PROTOCOL TO THE PROTOCOL FOR THE SUPPRESSION OF
UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS
LOCATED ON THE CONTINENTAL SHELF, 1988**

Comments on counter-terrorism, non-proliferation and boarding provisions

Submitted by the United States

SUMMARY

Executive summary: This document comments on the terrorism, non-proliferation and boarding provisions of the draft SUA protocols

Action to be taken: Paragraph 31

Related documents: LEG/CONF.15/3; LEG/CONF.15/4

1 This document is submitted to elaborate the views of the Government of the United States on the draft protocol to amend the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (draft SUA protocol) (contained in LEG/CONF.15/3) and the draft protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (draft protocol to Fixed Platforms protocol) (contained in document LEG/CONF.15/4).

The Legal Committee's compromise text, as drafted, is an important tool in combating terrorism

2 For the past three years, the Legal Committee has worked to finalize the draft protocols before the Diplomatic Conference (documents LEG/CONF.15/3 and LEG/CONF.15/4 refer), including at intersessional meetings and an unprecedented two-week Legal Committee meeting (the ninetieth session), held from 18-29 April 2005. These efforts, endorsed by the UN High Level Panel Report on Threats, Challenges and Change (December 2004), have resulted in two draft protocols that contain valuable tools in combating terrorism and the proliferation of weapons of mass destruction (WMD).

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- 3 The draft protocols (documents LEG/CONF.15/3 and LEG/CONF.15/4 refer) would:
- require parties to criminalize use of a ship or a fixed platform as part of a terrorist act (counter-terrorism offences);
 - establish an international legal basis to impede and prosecute the trafficking of WMD, their delivery systems and related materials on the high seas, helping implement our common obligations under UN Security Council resolution 1540 and closing loopholes that proliferators or terrorists might use to transfer WMD, their delivery systems and related materials (non-proliferation provisions);
 - establish the most well-developed boarding procedures and safeguards in any instrument of its type (boarding provisions); and
 - update the existing SUA Convention consistent with other recent UN terrorism conventions, by, among other things, including a political offence exclusion clause that is consistent with UN Security Council resolution 1373 (updating provisions).

4 The draft protocols are consistent with, and in many cases in furtherance of, the obligations under existing treaties and UN resolutions, including the United Nations Convention on the Law of the Sea (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS), the International Ship and Port Facility Security Code (ISPS), the Nuclear Non-Proliferation Treaty (NPT), the Chemical Weapons Convention (CWC), the Biological Weapons Convention (BWC) and UN Security Council resolutions 1373 and 1540.

5 The draft SUA protocol explicitly recognizes flag State jurisdiction - requiring express consent to board (article 8*bis* 5(c)) and recognizing the flag State's right to exercise jurisdiction (article 8*bis* 8) - and does not present an undue burden to maritime commerce.

Counter-terrorism offences – article 3*bis* 1(a)

6 These provisions have been thoroughly discussed and commented upon in the course of negotiation. In document LEG/CONF.15/10, one delegation proposes adding to article 3*bis* 1(a)(i) the “unlawful loading on board a ship”. The United States believes that this provision is unnecessary, as it would be covered under the accessory offences of article 3*quater*.

Non-proliferation provisions – article 3*bis* 1(b)

7 The non-proliferation amendments require parties to criminalize, subject to specific intent and knowledge requirements, transport on the high seas of WMD and certain related materials, as well as nuclear material and equipment. The savings clause in article 2*bis* 3 ensures that these offences preserve the rights and obligations of parties to the BWC and CWC, and coupled with the NPT savings clause (article 3*bis* 2), ensures the nuclear-related offences parallel the rights and obligations of NPT Parties under the NPT.

8 A few delegations continue to have concerns regarding the scope of the nuclear materials offence; the definition of “dual-use” items in the transport offence; the NPT savings clause; and the definition of transport. Also, one delegation continues to question the authority to incorporate principles derived from the NPT under the mandate of Assembly resolution A.924(22).

Nuclear materials offence - article 3bis 1(b)(iii)

9 Some delegations have raised objections, on the grounds that this provision exceeds the requirements of the NPT, which does not require comprehensive safeguards as a condition of nuclear supply to non-nuclear weapon States, so long as the nuclear material will be under IAEA safeguards in the recipient country (document LEG/CONF.15/12 refers). However, this provision must be read in conjunction with the NPT savings clause (see paragraphs 14-17 below). The NPT savings clause (article 3bis 2), coupled with the savings clause in article 2bis 3, ensures that the nuclear materials offence parallels the provisions of the NPT on nuclear supply. Thus, the combination of the nuclear materials offence and the savings clauses result in an outcome that is completely consistent with the rights and obligations under the NPT of the 188 Parties to that treaty, both among themselves and with regard to non-NPT parties.

Dual use offence – article 3bis 1(b)(iv)

10 A few delegations would prefer to define the items covered by the dual use offence by using UN Security Council resolution 1540's definition of "related materials" ("materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery") or by reference to national controls lists (document LEG/CONF.15/12 refers). The UNSCR 1540 definition of "related materials" refers to unspecified multilateral treaties and arrangements that not all countries adhere to and to national export control lists that differ among States. Because of these differences in national coverage, either of these approaches would result in creation of different SUA dual-use offences in each country, and therefore, hinder or prevent an interdiction or prosecution of an offence and the extradition of a fugitive.

11 One delegation has also sought the inclusion of a "terrorist motive" as an element of the offence (see document LEG/CONF.15/12). This proposal was not accepted by the Legal Committee, as it would create a loophole for WMD-traffickers acting as profiteers (to make money, not to foment terrorism). It would also ignore the requirement, in accordance with UNSCR 1540, that all countries must "take and enforce effective measures to establish domestic controls to prevent" proliferation by State and non-State actors.

12 The draft SUA protocol is not directed at legitimate commerce, dual-use or otherwise. If reasonable grounds exist to suspect a violation of this provision has occurred, a State can request that the flag State take a number of actions. These include redirecting the ship to the next appropriate port of call, boarding the ship itself, or granting a third State permission to board. However, it is entirely up to the judgment of the flag State as to whether or not to authorize action in any particular instance, as well as the exact nature of any such action. In any case, the draft SUA protocol does not authorize stopping and inspecting every shipment that might contain dual-use items; rather, only actions concerning particular WMD-related shipments would be taken and then only based on the authorization of the flag State and on solid information that convinces the flag State that the transport of the items in the particular shipment in question constitutes a SUA offence.

13 The current dual use offence language – originally proposed by Egypt, Greece and Japan - is the result of multiple rounds of intense discussions, consideration of numerous alternative proposals and significant compromises by many countries (including the United States). It is consistent with UNSCR 1540 and international non-proliferation treaties.

NPT savings clause – article 2bis 3; article 3bis 2

14 After extensive negotiation, at the ninetieth session of the Legal Committee, its Chairman proposed the compromise NPT savings clause currently included in the draft SUA protocol. At the ninetieth session, many countries expressed support for the new language, while others withheld their positions pending consultations with capitals. A savings clause along the lines of the Chairman's proposal is essential to preserve the ability of persons in the 188 NPT Parties to transport nuclear materials and nuclear-related dual use items consistent with the NPT. The United States supports the Chairman's compromise (resulting from the efforts of Canada, France, the United Kingdom and the United States) as the best way to facilitate agreement on the entire draft SUA protocol.

15 One delegation has argued that the NPT savings clause discriminates against the handful of non-NPT States because it would not protect nuclear commerce among those States (document LEG/CONF.15/12 refers). However, the savings clause would protect nuclear commerce between that handful of States and all NPT parties, so long as the nuclear material, if destined for a non-NPT party, will be under IAEA safeguards in that country, as required under the NPT, or if from a non-NPT party to an NPT party, so long as the recipient NPT party complied with its NPT obligations in regard to that material. Moreover, the savings clause would not criminalize nuclear commerce among the handful of non-NPT States that was conducted aboard non-SUA ships, or by air.

16 One delegation has also argued that the NPT savings clause is unnecessary and would conflict with its domestic legislation, which criminalizes any transfers of material, equipment and technology for use in any nuclear weapons program (document LEG/CONF.15/11 refers). This delegation also argues that the NPT savings clause is contrary to the obligations of nuclear weapon States under article VI of the NPT. (Article VI of the NPT obliges all NPT parties, "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.")

17 The NPT savings clause will not legitimize activities prohibited by the NPT. Rather, the NPT savings clause will preserve—not diminish—the rights and obligations under the NPT for NPT parties. It does not give NPT parties any greater or lesser rights than they already have under the NPT or change any NPT obligations, including with respect to article VI. The savings clauses in both articles 2bis and 3bis ensure that the draft SUA protocol parallels the NPT:

- Article 2bis 3 makes unequivocally clear that all of the obligations and responsibilities of NPT parties under the NPT, including NPT parties' obligations under NPT article VI, are preserved, by providing that the "rights, obligations and responsibilities" under the NPT are not affected by the proposed amendments.
- Article 3bis 2 ensures that NPT-compliant nuclear transport by **persons** is not criminalized (article 2bis 3 applies to a **State's** obligations and rights under the NPT).

18 Finally, although one delegation's domestic law may go beyond the obligations of the NPT, nothing in the draft SUA protocol requires it to change its domestic law to decriminalize activities that are not offences under SUA. So long as a State criminalizes no less than what would be required by the SUA amendments, there is no problem with a State choosing to control or criminalize more conduct. Indeed, that is certainly also the case in the United States.

Definition of transport - article 1(b)

19 After extensive negotiation, the Legal Committee agreed to a definition that limits transport to initiating, arranging or exercising effective control, including decision-making authority, over the movement of a person or item. As described in more detail in document LEG/CONF.15/14, this definition makes clear that persons, including seafarers, who have not intentionally participated in carrying out the acts proscribed by the SUA Convention, will not be subjected to criminal prosecution. One delegation has proposed that the word “arrange” be replaced by “knowingly facilitate” (document LEG/CONF.15/12). This language was previously proposed and was widely rejected. Including the subjective element of “knowledge” in the definition of transport is confusing and misleading, since the offences already have specific knowledge and intent elements in the chapeau and in each individual offence provision. Another delegation has proposed deletion of this definition (see LEG/CONF.15/10). The United States believes that this definition, as drafted, represents an important compromise, safeguarding seafarers, and should remain.

Authority under Assembly resolution A.924(22)¹

20 One delegation has argued that the non-proliferation amendments are not within the mandate of Assembly resolution A.924(22) (document LEG/CONF.15/12 refers). However, both the Legal Committee, at its eighty-eighth session, and the Council, at its ninety-second session, specifically addressed this issue and disagreed (see LEG 88/13, paragraph 43 and document C 92/D, paragraph 6). In particular, the Legal Committee noted that:

- rather than limiting the Legal Committee's work, resolution A.924(22) points in the direction of a wide mandate;
- the non-proliferation amendments had been before the Legal Committee for some time and delegations had ample opportunity during the previous three sessions prior to the eighty-eighth session of the Legal Committee to raise doubts concerning the scope of the resolution [and did not];
- the Legal Committee fully reported its work to the Council and the Assembly, and those Governing Bodies did not raise questions regarding the scope of the mandate -- in fact, the Committee's work was endorsed and given high priority as part of IMO's efforts in the field of maritime security; and
- the Legal Committee's work on non-proliferation issues needs to be considered within the broader context of the international response to terrorism and proliferation, including the mandates in relevant UN Security Council resolutions 1368, 1373 and 1456 expressing concerns regarding the illegal movement of deadly materials, and calling for international organizations to evaluate ways to enhance the effectiveness of their actions against terrorism.

21 The same delegation has also unsuccessfully argued that IMO is not the appropriate forum to address non-proliferation issues. We believe that IMO is an appropriate forum for such issues as they relate to maritime transport, given its expertise on maritime issues; its long history working on maritime security issues (e.g., SOLAS); the endorsement of its non-proliferation

¹ The issue of competence is considered in the Proposed Rules of Procedure in Rules 18 and 27 (See document LEG/CONF.15/2).

work by the UN High Panel; the call in UNSCR 1456 on international organizations to address these issues; and the fact that the Legal Committee and the Council believe that these issues are within the mandate of resolution A.924(22).

Boarding provisions – article 8bis

22 The draft SUA protocol establishes a comprehensive set of procedures and protections designed to facilitate the boarding of a vessel suspected of being involved in a SUA offence, while ensuring that flag State jurisdiction is respected. The boarding procedures do not change existing international maritime law or infringe upon the traditional principle of freedom of navigation. Instead, the procedures eliminate the need to negotiate time consuming *ad hoc* boarding arrangements when facing the immediacy of ongoing criminal activity. Having a comprehensive set of existing procedures and protections in SUA will help ensure that boardings, if authorized, will be conducted with appropriate protections, and, because the procedures and protections are already in place, also increase the chances of stopping ongoing criminal activity.

Safeguards and the treatment of seafarers – article 8bis 10

23 In document LEG/CONF.15/14, the United States and the International Confederation of Free Trade Unions (ICFTU) note that the draft SUA protocol seeks to balance the security concerns with the human rights of seafarers and the legitimate interests of the shipping industry by providing enhanced protection for innocent seafarers and carriers. The safeguards provisions in the draft SUA protocol provide seafarers with the most comprehensive protective regimes to be found in any international instrument of its type. The protections afforded seafarers are extensive, expansive, and in some cases will appear in an international instrument for the first time. For a more complete description of the safeguards afforded seafarers, see document LEG/CONF.15/14.

Claims – article 8bis 10(b)

24 The claims provision is the result of intense negotiation over several sessions of the Legal Committee and reflects a number of hard-fought compromises. The difficulty in negotiating this provision reflects the widely diverse set of claims policies and procedures adopted by the negotiating parties. The current claims provision not only accommodates the requirements of the various national claims regimes, but is consistent with the claims provisions of existing relevant international treaties, including UNCLOS and the Protocol against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention on Transnational Organized Crime. As such, the existing compromise claims language in the draft SUA protocol should be adopted unchanged.

25 In terms of United States national practice, as a matter of policy the United States compensates innocent people whose property is damaged by Federal officers during maritime law enforcement operations. Accordingly, the United States Congress has established mechanisms that permit the United States Navy (USN) and United States Coast Guard (USCG) to consider and pay meritorious claims for damaged property arising from maritime law enforcement operations. These mechanisms are administrative procedures, rather than judicial remedies, which permit the consideration and payment of meritorious claims by Executive Branch agencies.

Use of force – article 8bis 9

26 One delegation has suggested a number of drafting comments to this provision (document LEG/CONF.9 refers). The comments have the effect of being duplicative, introducing ambiguous concepts, or introducing previously-rejected language. Like the claims provisions, the use-of-force provision in the draft SUA protocol is the result of intense negotiation over several sessions of the Legal Committee and reflects a number of hard-fought compromises. The current use-of-force provision reflects common principles that are widely held amongst IMO countries. More importantly, the use-of-force provision reflects and is completely consistent with current practice on use of force in international law. As such, the existing compromise language in the draft SUA protocol should be adopted unchanged.

Updated terrorism provisions

27 The draft SUA protocol will also update SUA so it is in line with the most recent UN terrorism conventions (including the International Convention for the Suppression of the Financing of Terrorism (TFC) and the International Convention for the Suppression of Terrorist Bombings (TBC)) by:

- adding the relevant savings clauses with respect to other areas of international law (article 2bis (1) and (2));
- updating the accessory offence provisions (article 3quater);
- providing for liability for legal persons (article 5bis);
- updating the provision guaranteeing fair treatment (article 10(2));
- adding, consistent with UN Security council resolution 1373, the political offence exclusion clause (article 11bis) and the related provision regarding non-prejudicial interests (article 11ter); and
- including a mutual assistance provision with respect to the testimony of prisoners (article 12bis).

28 One delegation has expressed concerns that article 12bis does not respect the right to a speedy trial of a detained person who is awaiting trial and submitted a proposed amendment that would establish rigid time limits for the commencement of testimony (“within 15 days” of arrival) and limit the transfer to not more than 180 days (document LEG/CONF.15/13 refers). The speedy trial concern, however, is misplaced. To be transferred, the individual has to **freely give his informed consent**, and if the individual is concerned that he will not receive a speedy trial, he or she can withhold consent. Except for one phrase added to ensure the speedy return of the detained person who was transferred (providing that such detained person remains in the country only “as long as necessary to effectuate the needs of paragraph 1”), proposed article 12bis is identical to the similar provisions found in the TBC and TFC.

29 Moreover, any transfer pursuant to article 12bis for mutual assistance purposes would be a measure or proceeding carried out pursuant to the amended Convention, and therefore, fair treatment would be guaranteed under article 10(2), including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including human rights law. Rigid timetables are not conducive to effective law enforcement when utilizing the valuable tool provided by article 12bis.

Other matters

30 Comments were also received regarding not referencing definitions from the TBC and the International Atomic Energy Statute and removing the Annex (document LEG/CONF.15/10 refers). Similar proposals have been rejected by significant majorities. Additionally, with respect to revising the Annex procedures (document LEG/CONF.15/10 refers), a drafting committee, specifically formed for that purpose, revised the pre-existing TFC text, and these changes were adopted by the Working Group and the Legal Committee. We do not believe these provisions require further revision. The United States also supports the Secretariat's proposals with respect to preparing consolidated texts (document LEG/CONF.15/6 refers) and with respect to inclusion of preambular language referencing Assembly resolution A.924(22) and the ISPS Code (document LEG/CONF.15/7 refers).

Action requested of the Conference

31 The Conference is invited to take note of the content of this document and to comment and decide as it deems appropriate.
